GRIEVANCE ARBITRATION - THE PRESENT ROLE OF THE LABOUR RELATIONS BOARD

ADDRESS GIVEN TO

CONFERENCE ON THE GRIEVANCE ARBITRATION PROCESS

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Donald D. Carter
Chairman
Ontario Labour Relations Board

Professor (on leave)
Faculty of Law
Queen's University

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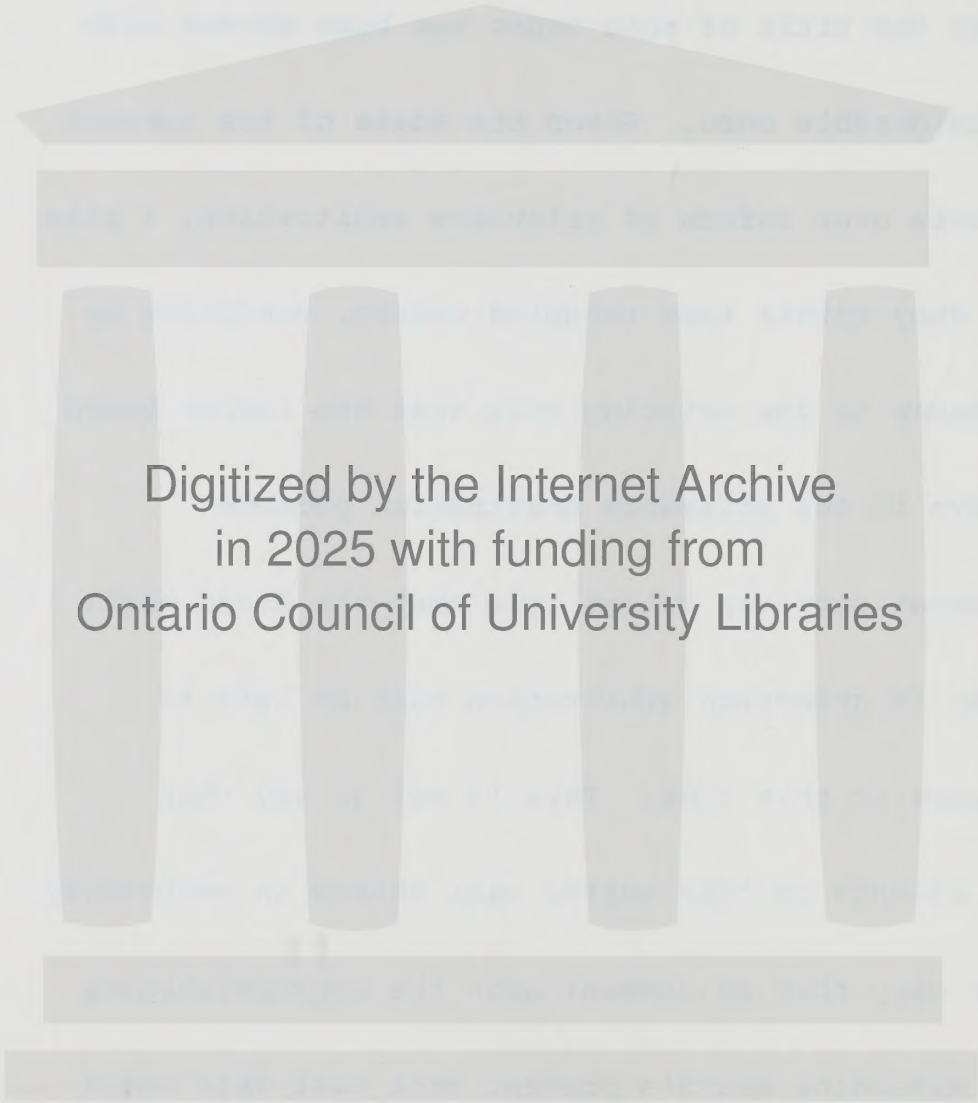
At the outset I should advise you that the title of this topic has been chosen with considerable care. Given the state of the current debate over reform of grievance arbitration, I plan to stay within less troubled waters, confining my remarks to the existing role that the labour board plays in the grievance arbitration process. Comment upon any future role that the Board might play in grievance arbitration must be left to others at this time. This is not to say that my silence on this matter will extend in perpetuity but only that my comment upon the appropriateness of extending Board's present role must wait until I resume my academic career. I want to make it clear, however, that any comments that I might make on the arbitration process will definitely



not take the form of a book. I have noticed that the organizers of this conference have resorted to giving away John Sanderson's informative book "Labour Arbitration and All That", indicating to me that the market for this type of publication would appear to be saturated.

The present relationship between the grievance arbitration process and the labour board relates to the primary theme of this conference which, as I understand it, is to examine ways in which grievance procedures and arbitration might be improved. I think that few persons would dispute the proposition that the jurisdiction now exercised by the Board does affect the process of grievance arbitration in a number of ways.

For one thing, the Labour Relations Act expressly gives the Board a role that is supportive of grievance arbitration. I refer now to the Board's power to advise the Minister as to whether he has authority to appoint an arbitrator or constitute a board of arbitration, and the Board's specific power to modify arbitration provisions in order that they conform to the model provision set out in the Labour Relations Act.

A second influence upon the grievance and arbitration process, and not an insignificant one, flows from the duty of fair representation imposed on bargaining agents by section 60 of the Act. The statutory standard set out in that section, and the imposition by the Board of a remedy for a breach of that standard, have a potential to affect the arbitration process.

A further Labour Board influence upon arbitration process occurs when the Board's jurisdiction to deal with breaches of the Act directly overlaps with that of the arbitrator to deal with breaches of the collective agreement. Such a coincidence of jurisdiction occurs where conduct can be characterized both as a breach of the Act and as a breach of a collective agreement.

Finally, the Board's direct jurisdiction over construction industry grievances, conferred by section 112a of the Labour Relations Act, can also be said to have an influence upon the conventional arbitration process. The section 112a procedure, in my view, serves as an alternative model, permitting a comparison to be made between the conventional model of the ad hoc adjudicator selected by the parties, and the more recent innovation of the full-time

public tribunal. Undoubtedly, the existence of the Board's direct jurisdiction over grievance arbitration has led to some of the current debate over the merits of the present system of grievance arbitration.

These labour board influences upon the arbitration process require some elaboration. Turning first to that jurisdiction of the Board which is supportive of the grievance arbitration process, some comment should be made upon the Board's role when advising the Minister as to whether an arbitrator should be appointed, or a board of arbitration constituted. In this situation the Board has been careful to avoid encroaching upon the jurisdiction of the arbitrator to determine whether a matter is arbitrable. In the Board's view, its role is simply to decide whether the parties are under a general obligation to resolve their differences

through the arbitration process, and not to go further and decide whether the particular matter is one falling within the collective agreement. (Haldimand-Norfolk Regional Health Unit, [1978] OLRB Feb. 197.) As a result, the Board has confined itself to either determining whether a collective agreement exists or whether its effect has been extended by operation of the statutory freeze imposed by section 70 of the Act. The Board's concern here is simply to ensure that the parties do not boycott the procedure established by the Act for the resolution of disputes arising out of collective agreements, or from the obligations imposed upon the parties by the statutory freeze.

Even this limited intrusion into arbitration process does not give the Board an exclusive jurisdiction to determine the existence of a collective agreement. A recent decision of the Ontario Supreme Court would indicate that an arbitrator, once appointed, has a jurisdiction to determine whether a collective agreement exists (Re Carpenters' District Council of Toronto and Vicinity and Engineering Structures and Components (1978), 85 D.L.R. (3d) 443 (Ont. Div. Ct.)). While the Supreme Court decision seems to suggest that this jurisdiction of the arbitration to determine the existence of a collective agreement can be implied from the statutory scheme for arbitration established by the Labour Relations Act, it might also be argued that this jurisdiction flows from an arbitrator's express authority under the Act to determine whether a matter is arbitrable.

In any event, it is now clear that the Labour Board is not the only forum in which the parties can contest the existence of a collective agreement.

I need say very little about the Labour Board's jurisdiction to bring the arbitration provisions in collective agreements up to the statutory standard. As you are probably aware, the Labour Relations Act requires that every collective agreement contain an arbitration provision to resolve all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable. If the parties fail to include such a provision in their collective agreement, it is deemed to contain the model provision found in the Act. The Board, moreover, is given the jurisdiction to

modify any arbitration provision that it considers to be inadequate but only so far as to make it conform to the model provision. This is a jurisdiction which is seldom exercised by the Board, and I can recall only one case where the Board has had to remedy an inadequate arbitration provision.

The interpretation and administration by the Board of the duty of fair representation probably has far greater consequences for the arbitration process than the Board's limited supportive jurisdiction just discussed. While the Chairman of the Labour Board can reasonably expect as an occupational hazard a certain amount of trade union opposition to the concept of a duty of fair representation, I am continually amazed by the vigorous opposition to this concept coming from certain management quarters. One concern that has been expressed is that the

existence of a duty of fair representation has led to an increasing number of grievances being taken to arbitration and, of course, fewer grievances being settled by the parties at the more informal stages of the grievance and arbitration process. A further concern is that the Board in determining whether there has been a breach of the duty of fair representation may end up arbitrating the grievance on its merits. I would like to comment on each of these concerns.

The Board, in applying the standard of fair representation set out in section 60, has been aware that a too rigorous application of this standard would impair the operation of the settlement mechanisms found in the grievance procedure. On more than one occasion the Board has clearly stated that the standard of conduct imposed on bargaining agents does not require a

trade union to process every grievance to arbitration. What the Board expects of a bargaining agent is that it put its mind to the merits of a grievance and that it give that grievance the same kind of consideration as given to any other kind of grievance. (Wakefield Harper, [1978] OLRB Rep. July 640.) This does not require a bargaining agent to alter its existing procedure for dealings with grievances, but only that it act fairly and reasonably within the procedures that it has established for itself (Municipality of Metropolitan Toronto, [1978] OLRB Rep. Feb. 143). While some may argue that even this application of the statutory standard interferes unduly with the grievance procedure, I would suggest that it represents a reasonable balance between the need to recognize that an individual employee has some claim to fair treatment in the grievance procedure and the concern that a bargaining agent's authority to settle grievances not be unduly curtailed.

The second concern - that the Board in applying the duty of fair representation might end up arbitrating the matter - has also been recognized by the Board. It has been made clear by the Board that, in determining whether the settlement of a grievance by a bargaining agent amounts to a breach of the duty of fair representation, it will examine only the prima facie merits of the grievance. A party to the unfair representation proceeding need not introduce all evidence relating to the merits of the grievance but only so much as is needed to establish that the grievance was given the degree of consideration required of a bargaining agent by the duty of fair representation. (Massey-Ferguson, [1977] OLRB Rep. Apr. 216.)

If a breach of the duty of fair representation is established by a complainant, the Board may order that a grievance be arbitrated

on terms that would ensure fair treatment of the grievor (Leonard Murphy, [1977] OLRB Rep. Mar. 146). Although the Board in imposing this kind of remedy may be required to override certain provisions of the grievance and arbitration procedure, the thrust of this remedy is consistent with the grievance arbitration process, being directed at restoring the employee to the situation under the grievance and arbitration process that would have been enjoyed but for the breach of the duty of fair representation. It should be made clear that the grievance is arbitrated, not by the Labour Board, but through an arbitration process which is at least consistent with the one set out in the collective agreement. Before anyone becomes alarmed by even this modest encroachment by the Board upon grievance arbitration, let me reassure you by saying that the Board has found

very few violations of the duty of fair representation. I can recall only one case during the last three years where the Board found a breach of section 60 and ordered that an employee grievance be arbitrated.

A potential conflict between the jurisdiction of the arbitrator and that of the Labour Board occurs where conduct can be characterized both as a breach of the collective agreement and a breach of the Labour Relations Act. Perhaps the most obvious example of this kind of overlap is the situation where the employee alleges that he has been discharged because of his union activity. If such an allegation could be established, it would constitute a violation of the unfair labour provisions of the Act and could also be an unjust dismissal contrary to the terms of the collective agreement.

As a general rule this potential conflict is resolved through the Board deferring to the arbitration process. Inherent in this policy of deferral is a recognition by the Board that, in the absence of any express statutory mandate, it should not be dealing with disputes arising out of the interpretation or administration of a collective agreement. There are two major exceptions, however, to this policy of deferral to arbitration.

The first exception applies where the Board considers that the arbitration process cannot deal fully and effectively with the matter. (Imperial Tobacco Products (Ontario) Limited, [1974] OLRB Rep. July 418; The Corporation of the County of Middlesex, [1976] OLRB Rep. Aug. 427.) Such a situation might occur where there is a direct conflict between the interests of the union and

those of the grievor, or where there is some form of collusion between the union and employer to the detriment of the employee.

A second exception to the Board's policy of deferral to arbitration applies where a complaint raises issues that extend beyond the interpretation and administration of the collective agreement to affect the general structure of collective bargaining in the Province. It is the clear responsibility of the Labour Board under the Labour Relations Act to define the general structure of bargaining, and in such a situation deference to arbitration can no longer be the appropriate response. The Board, for example, has been reluctant to defer to arbitration where faced with a complaint raising the issue of the extent of the statutory freeze on terms and conditions of

employment imposed by section 70, even though, collaterally, it may have to interpret collective agreement terms which have been extended by operation of the freeze. (Kodak Canada Ltd., [1977] OLRB Rep. Feb. 49.) Recently, moreover, the Board proceeded to hear a complaint that an employer had wrongfully impounded union dues and found that such conduct was in violation of the Labour Relations Act, even though such conduct may also have amounted to a violation of the collective agreement (Truck Engineering Ltd., [1977] OLRB Rep. Jan. 2; [1978] OLRB Rep. Jan. 70).

I turn now to the Board's direct jurisdiction over grievance arbitration in the construction industry. Under section 112a of the Labour Relations Act, enacted in 1975, a party to a construction industry collective agreement may refer to the Board "a grievance

concerning the interpretation, application, administration, or alleged violation of the agreement, including any question as to whether a matter is arbitrable". This provision does not preclude the parties from choosing to use their own grievance and arbitration procedure, but merely offers to the grieving party a choice of procedures. The statutory procedure is fully concurrent with any procedure set out in the collective agreement, and access to it cannot be restricted by anything that might be found in the collective agreement. (The Lummus Company Canada Ltd., [19762 OLRB Rep. Jan. 980.)

In effect the statutory procedure provides a clear alternative to both the grievance procedures and the arbitration procedures found in construction industry collective agreements. A party need not exhaust the grievance procedure

set out in the collective agreement but may refer the matter to the Board immediately. At that point the Board appoints a labour relations officer to meet with the parties before the hearing is held, which must be within 14 days from the date of referral. The settlement rate in this type of case runs at slightly over 80%. I would suggest that there are a number of reasons for such a favourable settlement rate: 1) the injection of a professional settlement officer into the dispute in the place of what might be a cumbersome grievance procedure; 2) the imminent hearing deadline which is only a few days after the meeting with the officer; 3) the fact that the parties will avoid the Board's hearing charge, set at $100 per day for each party, if a settlement is reached.

If no settlement is reached, the matter goes to a hearing before a panel of the Board. The approach taken by the Board in adjudicating the matter would be analogous to that taken by a grievance arbitrator appointed under the collective agreement. The Board looks primarily to the language of the collective agreement, but may also take into account relevant statutory policy. (Ontario Hydro, [1978] OLRB Rep. Apr. 331.)

This statutory procedure for the resolution of construction industry grievances has been one of the great successes of the 1975 amendments. As the Waisberg Commission observed, the conventional arbitration process was just not suited to the construction industry. The leisurely pace of the conventional arbitration system meant that construction jobs were often completed before arbitration was even underway.

Moreover, the cost of the conventional process made it impractical for there to be an effective remedy for breaches of collective agreements involving only small amounts of money. It should not be surprising, therefore, that the section 112a procedure has all but supplemented conventional grievance arbitration in the construction industry.

The Board, during the fiscal year 1977-78, dealt with 264 references under section 112a. As I have already indicated, just over 80% of these were settled leaving roughly 50 to be adjudicated by the Board. The advantages of this procedure to the parties should be apparent. Instead of the long delay between the giving of notice to arbitrate and the actual hearing of the matter, which according to Mr. Justice Kelly's report is approximately seven months for the conventional arbitration procedure, a matter must

be heard by the Board within 14 days from its referral to the Board. During the short interval between the referral and the hearing, the parties have the benefit of the services of a professional settlement officer. Finally, a substantial part of the cost of the process is underwritten by the government, as is the case with the Board's other procedures for resolving labour disputes.

The statutory procedure for arbitration in the construction industry is clearly and alternative model to conventional arbitration. While I do not think it appropriate for me to enter the debate over whether the model should be extended beyond the construction industry, I have no hesitation in saying that it has worked well in the construction industry where there existed almost a complete arbitral vacuum before the statutory procedure was introduced.

The statutory procedure has filled this vacuum providing effective machinery for the resolution of construction industry grievances.

My remarks have attempted to show some of the more substantial points of contact between the Labour Board and the arbitration process. I think that it is fair to say that the Labour Board and arbitration are complementary institutions, there being very little conflict between the two. Even where the Board has assumed a direct jurisdiction over arbitration in the construction industry, there has been a minimum of friction between the two institutions because the Board entered what was essentially an unoccupied area. It is my hope that this description of the present relationship between the Labour Board and arbitration has been of some assistance to you in understanding the grievance arbitration process.